

* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ O.M.P. (COMM) 429/2017

Reserved on: 06.08.2018

Date of decision : 28.11.2018

NTPC LIMITED

..... Petitioner

Through: Mr.Vikas Singh, Sr. Adv. with
Ms.Bani Dixit, Ms.Deepika,
Mr.Kapish Seth, Ms.Srishti
Bannerjee, Advs.

versus

THIESS MINECS INDIA PVT. LTD. & ANR. Respondents

Through: Mr.P.Chidambaram, Sr. Adv. with
Mr.Dhruv Dewan, Mr.Rohan
Batra, Ms.Harshita Choubey,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner challenging the Arbitral Award dated 24.07.2017 passed by the Arbitral Tribunal consisting of three Arbitrators. The Arbitral Tribunal has culled out the majority Award in the following words:-

- "1) The Claim Petition filed by the Claimants is partly allowed.
2) The Counter Claim lodged by the Respondent is also partly allowed.
3) The Claimant No.1 is held entitled to a declaration as prayed for that Respondent NTPC has unlawfully and illegally terminated the Project Agreement on 7th May 2014.*

- 4) *The prayer made by Claimant No. 1 for specific performance of Project Agreement against Respondent is rejected.*
- 5) *The Claimant No.1 is held entitled to recover from Respondent an amount of Rs. 123.66 crores towards damages for illegally and unlawfully terminating the Project Agreement.*
- 6) *The Respondent is held entitled to set off an amount of Rs. 56 crores paid by it to the Claimant No. 1 towards Development Stage Expenditure.*
- 7) *The Claimant No. 1 is thus held entitled to recover and the Respondent is held liable to pay to the Claimant No. 1, an amount of Rs. 67.66 crores (Rs. 123.66 crores minus Rs. 56 crores) towards damages for illegally terminating the Project Agreement.*
- 8) *The Respondent - NTPC is directed to pay the aforesaid amount of Rs. 67.66 crores to Claimant no. 1 within 30 days from the date of the Award;*
- 9) *If the aforesaid payment is not made by the Respondent to Claimant No. 1 as directed, the Respondent shall pay interest on the said amount of Rs. 67.66 crores at the rate of 10 per cent per annum with effect from the date of award, till the date of payment.*
- 10) *The Respondent - NTPC shall refund the amounts of three Bank Guarantees amounting to Rs. 91 crores (Rs. 21 crore + Rs. 35 crore + Rs. 35 crore) along with interest accrued thereon in favour of Claimant No. 1 – Thiess Minecs Pvt. Ltd.*
- 11) *The Respondent – NTPC shall refund the amount of one Bank guarantee amounting to Rs. 7 crore along with interest accrued thereon in favour of Claimant No. 2 - Thiess Pty. Ltd.*
- 12) *The Respondent – NTPC shall also pay interest on the aforesaid four Bank Guarantees at the rate of 10 per cent annum to the Claimants with effect from 08 May 2014 till the date of payment.*
- 13) *Rest of the reliefs claimed by the Claimants in the Statement of Claims as also the reliefs sought by the Respondent in the Counter-claim are refused/rejected.*
- 14) *The prayer of the parties for payment of costs incurred in various legal proceedings in different courts is rejected.*
- 15) *The Parties are directed to bear their own costs in the present arbitral proceedings.”*

2. A reading of the Award would show that the Arbitrators were unanimous in their finding that the petitioner had unlawfully and illegally terminated the Project Agreement on 07.05.2014 and that though the respondent no. 1 was not entitled to seek Specific Performance of the Project Agreement, it was entitled to recover damages for such illegal and unlawful termination of the Project Agreement. The difference of opinion was on the quantum of such damages. The Arbitral Tribunal was also unanimous in its opinion that the petitioner was liable to refund the amounts of the three bank guarantees wrongfully encashed by it.

3. The disputes between the parties arose in relation to the Project Agreement for development and operation of Pakri Barwadih Coal Block (hereinafter referred to as the PB coal block) dated 14.07.2011 executed between the petitioner and the respondent no. 1.

4. The petitioner had been allocated the PB coal block in 2004. On 08.02.2007 it issued a Request for Proposal to identify and appoint an internationally competent mine developer and operator for development and operation of the PB coal block. The respondent no. 1 submitted its techno-commercial proposal dated 12.04.2007 and thereafter, discussion and correspondence ensued between the petitioner and respondent no. 1 between 2008 to 2010 resulting in issuance of Letter of Acceptance dated 30.11.2010 by the petitioner in favour of respondent no. 1. The Project Agreement dated 14.07.2011 was finally executed between the parties.

5. As per the clauses of the Project Agreement, the total contract period was divided into two stages: 1) Development Stage - to be completed within 360 days from the date of commencement, which was

30.11.2010; and 2) Operations Stage - which was to commence immediately following the Development Stage on the “Coal Production Start Date”, which was defined as the day immediately following the last day of the Development Stage.

6. Clause 8.1 of the Project Agreement sets out the petitioner’s obligations, while Clause 8.2 of the Project Agreement sets out the obligations of respondent no. 1 at the Development Stage. Clause 8.3 provided for extension of the Development Stage and reads as under:-

“8.3 Extension of Development Stage

(a) The Parties shall keep each other informed on the progress achieved vis-à-vis the Operational Plan in meeting their respective obligations specified in Clause 8.1 or Clause 8.2, as the case may be. In the event that either Party expects a delay in fulfilling its obligations, it shall promptly inform the other Party of such delay together with reasons for such delay and corrective action(s) taken
(b) In the event that either Party fails to fulfill its obligations under Clause 8.1 or 8.2, as the case may be, within 360 days from the Commencement Date, the defaulting Party shall have the right to seek extension of Development Stage by a period of 450 days including any extension on account of Force Majeure without any financial implication on either side. However the extension in Development period shall be considered for adjustment of Mining Fee on account of Price escalation. In the event that the defaulting Party fails to fulfill its obligations even during the extended period of 450 days for reasons beyond the reasonable control of the Party, the parties shall have good faith discussions and mutually agree upon the future course of action depending upon the circumstances prevailing at that time.”

7. The petitioner vide letter dated 17.02.2012 granted an extension of the Development Stage by 450 days, that is, upto 16.02.2013.

8. As the Development Stage could not be completed, the petitioner issued a Show Cause Notice dated 10.07.2012 to the respondent no.1 under Clause 24.4(a) of the Project Agreement. The respondent no. 1 replied to the Show Cause Notice vide its letter dated 08.08.2012. Thereafter the parties held a meeting on 05.09.2012, followed by respondent no.1's letter dated 11.09.2012 and good faith discussions on 07.02.2013 and 20.02.2013. Various letters were also exchanged between the parties.

9. The petitioner vide its letter dated 26.04.2013 granted a provisional extension of Development Stage for a further period of 360 days, that is, upto 11.02.2014, without prejudice to its right to levy liquated damages.

10. On 11.12.2013, the respondent no. 1 applied for further extension of the Development Stage by a further period of 360 days with effect from 12.02.2014. The respondent no. 1 further called for good faith discussions in this regard.

11. In such good faith discussions held on 24.01.2014, the petitioner agreed to extend the Development Stage by a further period of 360 days with effect from 12.02.2014, subject to the approval of the competent authority of the petitioner. However, on 07.05.2014, the petitioner issued the termination notice as also invoked the Bank Guarantees submitted by the respondents leading to the disputes between the parties.

12. Respondents invoked arbitration vide their notice dated 19.06.2014 resulting in the constitution of the Arbitral Tribunal, which has passed the Impugned Award.

13. Learned senior counsel for the petitioner assails the Impugned Award on the ground that the same has been passed after almost one and a half years of reserving the same for pronouncement. He submits that due to this delay many submissions of the petitioner have escaped attention of the Arbitral Tribunal and the Award is based only upon the arguments made by respondent no. 1. He relies upon the following judgments in support of his contention:-

- ***BWL Ltd. vs. UOI & Anr.*** (26.11.2012 – DEL HC), [FAO (OS) 398-399/2012]
- ***M/s Satya Parkash & Brothers Pvt. Ltd. vs. North Delhi Municipal Corporation*** (08.05.2017 – DEL HC), O.M.P. (COMM) 75/2016
- ***Harji Engg. Works Pvt. Ltd. vs. Bharat Heavy Electricals Ltd. and Anr.*** (22.09.2008-DEL HC), OMP 241/2006

14. I have considered the submission made by the learned senior counsel appearing for the petitioner, however, find no merit in the same. A perusal of the Award would show that the Arbitral Tribunal has passed a detailed Award after considering the submissions made by the counsels for the parties. It may be true that the Tribunal may have found merit in the submissions made by the respondent no.1, however, from the same it cannot be said that the submissions made by the petitioner have been ignored. Whether the findings of the Arbitral Tribunal deserve any interference by this Court in exercise of its power under Section 34 of the Act, would be different from considering that the Award is liable to be set aside only on the ground of such delay in pronouncement of the

Award. I may also note that the disputes between the parties involved perusal of voluminous evidence and facts and therefore, merely on the ground of delay the Award cannot be set aside.

15. In **BWL Ltd.** (Supra), the delay was of a period of nearly five years. It was in those peculiar facts that the Division Bench of this Court set aside the Awards Impugned therein.

16. In **Satya Parkash & Brothers Pvt. Ltd.** (Supra) and **Harji Engg. Works Pvt. Ltd.** (Supra) there was a delay of three years in passing the Awards impugned in those petitions. The Court also considered other circumstances in relation to the arbitration proceedings in those cases for setting aside the Award.

17. In the present case, apart from contending that the Award has been passed with a delay of one and half years, there are no other similar allegations made by the petitioner regarding the conduct of the arbitration proceedings by the Arbitral Tribunal. I may also note that in the present case, the three Arbitrators have written separate opinions, with the Arbitrators writing their own opinion on the point of difference with the majority Award.

18. I therefore, find no merit in the above contention of the learned senior counsel for the petitioner and reject the same.

19. The learned senior counsel for the petitioner has thereafter submitted that the Award is liable to be set aside as it has failed to take note of the relevant terms of the Agreement between the parties. He submits that Clause 3.2 of the Agreement required the Mine Operator to

inspect the Site of work and it has to inform itself regarding the Site and the local and other conditions referred to in the RFP document. It further provided that for such conditions, the Mine Operator was not to be relieved from its liability to perform the Agreement in accordance with its terms. He submits that in view of this Clause, respondent no. 1 could not have contended that the local conditions were such which did not permit respondent no. 1 to perform its part of the Contract.

20. I have considered the submissions made by the learned senior counsel for the petitioner, however, find no merit in the same. Clause 3.2(c) of the Agreement is reproduced hereinbelow:-

“Clause 3.2 Acknowledgments and Undertakings:

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(c) The Mine operator hereby acknowledges and agrees that failure by it to inspect the Site to the extent that was practicable and inform itself regarding the Site, the physical conditions, geology and geotechnical characteristics and other information/data relating to the Site and the local and other conditions referred to in the RFP Documents shall not in any manner whatsoever relieve the Mine Operator of its liability to perform this Agreement in accordance with its terms.”

21. A reading of the Clause would clearly show that the Mine Operator could not be absolved of its contractual obligations on the ground of difference in the physical conditions, geology and geotechnical characteristics or other information/data relating to the Site and the local conditions referred in the RFP document. The same, however, would not absolve the petitioner of its obligations under Clause 8.1 of the Agreement, which is reproduced hereinbelow:-

“8.1 Owner’s Obligations

(a) Approvals

The Owner shall obtain the clearances for the Project set forth in Clause 16 of Schedule 5

(b) Cross country conveyor system, silo and Railway Siding

The Owner shall construct the necessary cross country conveyor from the coal stockyard leading to coal load out silo using the following options

OptionI- Troughed belt conveying system from TP-1 to Silo

OptionII- Troughed belt conveying form TP-1 to TP-3 Single flight pipe Conveyor from TP-3 to TP-7 Troughed belt conveying form TP-7 to Silo.

The boundary wall along the conveyor corridor is replaced by chain link lending and the concrete paving below the conveyor gallery and other balance areas is replaced with adequate compacting.

The railway siding and the necessary wagon loading facilities shall also be constructed by Owner.

(c) Approvals related to use of land and access to Site

(i) The Owner shall obtain, renew and retain mining rights for the Mining Lease required for the provision of the Mining Services.

(ii) Pay all rentals payable under the Mining Lease.

(iii) The Owner shall provide the Mine Operator with reasonable access to the Site to enable the Mine Operator to commence and undertake Development Stage activities. The access provided by the Owner to the Mine Operator in accordance with this Agreement shall always be sufficient to reasonably address the Mine Operator’s requirements as stated in the Mine Plan and the Operational Plan.

(d) Power arrangement

The Owner shall provide electricity arrangement to the Mine Operator on the Site for initial mining operation through the main substation of the PB Block with feeder voltage at 11 KV and subsequently at 33KV till the HT line at 132 KV is brought to the Site by the Owner. Further the Owner is also making an arrangement for backup power of around 10 MVA through the diesel generator sets. The power supply to the Mine Operator shall

be at the actual cost at which it is available to the Owner at the Site.

The current cost at which the power supply is available from Jharkand state electricity board is:

(i) Demand Charges (for the total contracted MVA)-INR 140 per KVA per month, based on sanctioned load (MVA);

(ii) Variable charge (per unit basis) INR 4 per kWh;

(iii) Monthly minimum charges shall be subject to a minimum amount of INR 250 per KVA, based on sanctioned load (MVA);

Further the back up power generated from DG set is estimated to be available at a cost of INR 9.00 per unit based on the current estimates (considering diesel price of INR 34.65 per litre).

(e) Owner's Facilities

The Owner shall cause the construction and commissioning, of the Owner's Facilities specified at Clause 2 of Schedule-5 in accordance with Good Industry Practice as per the schedule specified in the Operational Plan.

8.1.5A The Owner will ensure that the Owner's Facilities (including the Cross country conveyor system, silo and railway sliding) are fit for their purpose and constructed in accordance with Good industry Practice."

22. Clause 14.3 and 14.4 of Schedule 2 of the Agreement are quoted hererinbelow:-

"14.3 Access

The Owner shall provide safe and reasonably unobstructed access to the site. However, for special or temporary rights-of-way, if any, the Mine Operator shall arrange and bear all costs.

14.4 Site Conditions

The Site shall be provided to the Mine Operator free and clear of manmade obstructions or interferences, artifacts and hazardous materials upon commencement of the Work. The Mine Operator acknowledges that it has investigated and satisfied itself to the extent set out in Clause 3.2 as to the conditions affecting the work, including but not restricted to conditions bearing upon

transportation, disposal, handling and storage of materials, and the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the Site. The Mine Operator also acknowledges it is aware of uncertainties of weather, water runoff characteristics and similar physical conditions at the site.”

23. The Arbitral Tribunal, after considering the evidence led by the parties before it has held that the petitioner was unable to take over possession of the land and give the same to the respondent no. 1 though in terms of Clause 8.1, it was the obligation of the petitioner to provide the site of the project to respondent no. 1. In view of such finding, reliance of the petitioner on Clause 3.2 of the Agreement cannot be sustained.

24. I may only note that before the Arbitral Tribunal the petitioner had placed reliance on Clause 10.1(c)(iii) of the Agreement which reads as under:-

“10.1 Owner’s Obligations

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(c) Land Acquisition

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(iii) The Owner shall endeavour to provide the Mine Operator land in advance of mining activities sufficient to meet the Mine Operator’s requirement for the next five years. In any case the Owner shall ensure that at least two years advance land is provided to the Mine Operator. However, a failure in this regard shall for the purposes for Clauses 24.2(b), be considered as Owner’s Event of Default. The Owner shall acquire the land and provides vacant possession on “As is Where is” basis to the Mine Operator for mining and associated activities in accordance with Applicable Laws.”

25. The petitioner contended that as the land was to be given on “as is where is” basis, the contention of the respondent no. 1 in relation to encroachment of land etc. could not be accepted. The Arbitral Tribunal considered this objection and rejected the same holding as under:-

“We are not impressed by the contention; As rightly submitted by the learned counsel for the claimant, Clause 10 provides for “Operations Stage Obligations” of the parties. Admittedly, Development Stage Obligations of the parties were not over and the contract was terminated prior to commencement of Operation Stage. But even the said clause, in our opinion, does not help the respondent inasmuch it states that the Owner shall acquire the land and provide vacant possession on “As is Where is” basis to the Mine Operator for mining and associated activities in accordance with law.

It is, therefore, clear and requires no argument that initial duty to acquire land and to give possession thereof to the claimant was on the respondent. Once such possession is handed over to the claimant, obviously, it was the obligation of the claimant to protect the land and if thereafter possession of the land is lost or there is encroachment, the claimant cannot find fault with the respondent nor it can compel the respondent to restore possession from encroachers.

From the facts already stated earlier, it is established by the claimant on the documentary and oral evidence that neither the respondent was able to take possession of land nor possession could be given to the claimant. The contention of the respondent, therefore, has no force and cannot be accepted.”

26. No fault can be found on the above interpretation of the terms of the Agreement by the Arbitral Tribunal.

27. The Supreme Court in *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49, has held as under:

“42. In the 1996 Act, this principle is substituted by the ‘patent illegality’ principle which, in turn, contains three subheads:

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42.3(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

28. Rules applicable to substance of dispute.—(1)-92)* * *

(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. ”

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do.

43. In McDermott International Inc. v. Burn Standard Co. Ltd.,(2006) 11 SCC 181 this Court held as under: (SCC pp. 225-26, paras 112-13)

“112. It is trite that the terms of the contract can be expressed or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of

law. [See *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission*, (2003) 8 SCC 593;2003 Supp (4) SCR 561 and *D.D.Sharma v. Union of India.*] (2004) 5 SCC 325.

113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the fact of the award.”

28. In ***National Highways Authority of India vs. ITD Cementation India Ltd.*** (2015) 14 SCC 21, the Supreme Court reiterated:

“25. It is thus well settled that construction of the terms of a contract is primarily for an arbitrator to decide. He is entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the contract. The Court while considering challenge to an arbitral award does not sit in appeal over the findings and decisions unless the arbitrator construes the contract in such a way that no fair-minded or reasonable person could do.”

29. Learned senior counsel for the petitioner has also placed reliance on the letter dated 11.09.2012 addressed by the respondent no. 1 to the petitioner to contend that the respondent no. 1 itself had given a Schedule for achieving major activities to be undertaken by it between October 2012 to March 2013 on the Project. He submits that this letter itself falsifies the stand of the respondent no. 1 that the Project could not be implemented due to breach of obligations on part of the petitioner.

30. In my opinion the said letter cannot be read selectively. The said letter itself records as under:-

“We are grateful to you for inviting us to a meeting at the NTPC office in NOIDA on 05.09.2012. During this meeting, we submitted the present status of the Project, and it was agreed that TM and NTPC shall jointly work to ensure the start of coal production from Pakre Barwadih Coal Mining Project (“Project”) by March 2013.

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As discussed during the meeting we request NTPC to urgently nominate the Owner, Agent and Manager for the Pakri Barwadih Coal Mining Project as per DGMS requirements stated in their letter of 30 August 2012 (herewith enclosed for your ready reference). This is essential to enable TM to submit the necessary applications to DGMS (under NTPC’s signature) to obtain the statutory permissions required for commencing mining operations. As informed to you earlier (vide our letters of 9 August, 2012). TM has already placed firm orders for mining equipment to be deployed in the Project, and the ground contouring survey of the proposed site of mining operations is also underway.

TM submitted the importance of evacuation of coal to which NTPC agreed to initiate the process for arranging the transportation and loading of coal from the mine area.

In view of the positive developments in the Project due to the sustained efforts of both NTPC and TM, we are confident that TM will be able to re-start site work in the Project at an early date.”

31. A reading of the above letter would clearly show that the time schedule mentioned by the respondent no. 1 was not unconditional in nature but had been arrived at by the respondent no.1 based on discussions between the parties held in the meeting on 05.09.2012 and pre-conditioned on performance of certain obligations by the petitioner. This letter in no way can be read as an admission of the respondent no. 1

that there were no issues with respect to discharge of obligations by the petitioner under the Project Agreement. In any case, the Arbitral Tribunal has considered the issue of discharge of obligations under the Project Agreement by the respective parties and therefore, reliance on one document in isolation would not be proper.

32. One of the major points urged by the learned senior counsel for the petitioner is the concealment of the arbitration proceedings between the respondents and Roshni Developers Private Limited (RDL)/Indu Projects which were pending in Singapore. The said arbitration proceedings had arisen between the respondent no.1 and RDL/Indu Projects in relation to the Memorandum of Understanding dated 02.07.2008 executed between the said parties for removal of over burden / inter burden (OB/IB) to the extent of 67% of the total OB/IB for 22 years. On 06.03.2012, High Court of Singapore had passed an order of injunction against respondent no.1 from granting a sub-contract for performing work relating to the PB Coal Block. On 12.07.2012, the High Court of Singapore clarified the scope of its injunction order to the effect that the same did not operate as a restraint on the respondent no. 1 from sub-contracting 33% of OB removal work. The said interim order continued till December 2014. It is contended by the learned senior counsel for the petitioner that not only were these proceedings initially concealed by the respondent no. 1 from the Arbitral Tribunal, but also that the disputes between the respondent no. 1 and RDL/Indu Project were the real reason of the delay/non performance of the obligations by the respondent no. 1.

33. The learned senior counsel for the petitioner has further placed reliance on an e-mail dated 04.05.2012 addressed by Mr.Dilip Kumar (CW-2) to the Senior Executives of the respondents stating that they were unable to perform works owing to “ongoing legal case at Singapore”. He submits that this was a clear admission on the part of the respondents that the litigation at Singapore was the major cause of delay in the performance of obligations under the Project Agreement.

34. On the other hand, the learned senior counsel for the respondents submits that the arbitration proceedings between the respondent no. 1 and RDL/Indu Projects were not relevant for the purposes of the present arbitration proceedings between the petitioner and the respondents. He further submits that the allegation of the petitioner that the delay in execution of the work was caused due to the interim order passed by the High Court of Singapore is totally incorrect. He submits that the land for carrying out OB work was identified by the petitioner for the first time only on 20.06.2012. Before this date no OB removal work could have started. Almost immediately thereafter, on 12.07.2012 the High Court of Singapore clarified the scope of the injunction order to the effect that the same did not operate as a restraint on the respondent no. 1 from sub-contracting 33% of the OB removal work. He submits that during the intervening period between 20.06.2012 to 12.07.2012 and thereafter no OB removal work could have been started as permission from Coal Controller for opening coal seams was issued only on 18.11.2013. He submits that till the time the mine opening permission was granted, no OB removal work could have been carried out. He further submits that

the contention of the petitioner that mine opening permission from the Coal Controller had to be obtained by the respondent no.1 and that the Arbitral Tribunal has given premium to respondent no.1's own default in not obtaining the permission, is incorrect as the same had been delayed on account of the petitioner's failure to appoint the Agent-Cum-Manager, who was appointed only on 23.03.2013 and even thereafter, there were delays on the part of the petitioner in giving supporting documentation and other procedural requisites for obtaining mine opening permission from the Coal Controller.

35. I have considered the submissions made by the learned senior counsels appearing for the parties. The Arbitral Tribunal has also discussed the issue of suppression and the effect of the injunction order granted by the High Court of Singapore in great detail. The Arbitral Tribunal held that though the respondents ought to have informed the Arbitral Tribunal of the said proceedings in Singapore, the same had not resulted in delay in execution of the work by the respondent no.1 or non performance of Development Stage obligations under the Project Agreement. The Arbitral Tribunal has also considered the effect of each of the obligations of the parties under Clause 8 of the Project Agreement to arrive at its conclusion that the termination of the Agreement by the petitioner was not justified. In view of such finding, the plea of the petitioner cannot be sustained.

36. The learned senior counsel for the petitioner further submits that the Arbitral Tribunal has erred in holding that the petitioner failed to provide land to the respondents in order for the latter to complete their

Development Stage obligations under the Contract Project. Relying upon Clause 1.1 of Schedule 5 of the Project Agreement, he submits that the land was to be provided by the petitioner to the respondent no. 1 in a phased manner. Land relating to MDO Colony, Coal Stockyard, Secondary Sizing and Reclaimer Stacker had been provided by the petitioner to the respondent no. 1, however, no construction had taken place even on this portion of land till the date of termination. In this regard he has placed reliance on certain correspondence exchanged between the parties. He further contends that as on the date of termination of the Project Agreement nearly 487.78 Hectare of land had been provided to the respondent no. 1 for dumping in Dump C and 71.65 Hectare for infrastructure, free from encumbrances and the respondent no. 1 had been requested to start the work. He submits that had the respondents commenced the execution of the work on the land that was allotted to them by the petitioner, the protest being faced by them from the occupier would also have mitigated. Relying upon the e-mail dated 03.11.2011 addressed by R. Srikanth (CW-3) to one Ken Morris of respondent no. 2 company, he submits that it has been clearly admitted that the respondent no. 1 has caused delay in obtaining clearance from the petitioner and wanted to focus only on revenue earning activities in the beginning. He submits that the adverse conditions prevailing at the Site were well known to respondent no. 1 at the time of submitting its bid as acknowledged by it in its letter dated 20.06.2007. Infact, in the said letter respondent no.1 had assured that on being appointed as the MDO it will immediately and without delay commence a range of community initiatives which would be effective in encouraging local communities to

support and participate positively in the mining Project. It was based on this assurance that the Project Agreement had been executed between the parties. He submits that the Arbitral Tribunal has wrongly excluded the said letter alongwith letter dated 12.04.2007 from consideration on an erroneous ground that they were in relation to the bidding process and not at the Development Stage obligations after the Agreement.

37. On the other hand, the learned senior counsel for the respondents submits that the petitioner has failed to provide adequate land for fixed infrastructure facilities as well as initial mining. He submits that no land between the Dump A and Dump B was given to respondent no. 1. There was a failure on the part of the petitioner to provide access. As far as reliance on the letters dated 12.04.2007 and 20.06.2007 is concerned, the learned senior counsel for the respondents submits that the Arbitral Tribunal has rightly held that after execution of the Project Agreement, the parties were bound by the express terms and the conditions of the same. Even otherwise, these letters cannot relieve the petitioner from its obligations to provide land and implement its R&R policy under the Project Agreement.

38. The Arbitral Tribunal has considered the above issue in detail and relying upon the terms of the Agreement, the correspondence exchanged between the parties, as well as the representations made by the petitioner to the Government of India in Parliament, as also submissions made by it before the Supreme Court, has held that the initial duty to acquire land and give possession thereof to the respondents was on the petitioner. It was established that neither the petitioner was able to take possession of

the land nor could possession be given to the respondents. The Arbitral Tribunal held as under:-

“We have already considered this aspect earlier. On the basis of documentary evidence and material placed on record, we have recorded a finding that under the Project Agreement, it was the duty of the respondent to acquire land and to give possession of the site free from all encumbrances to the claimant which the respondent failed to fulfil. For several reasons, such as, failure to frame and implement R & R Policy, failure to remove encroachment, failure to pay compensation to land-owners, adverse and unfavourable "law and order" situation, lack of proper infrastructure, etc.; the respondent could not make the Site free from all encumbrances available to the claimant so as to enable Thiess to commence work and to perform Development Stage Obligations.

We have also held that whatever might have been stated by the parties prior to entering into contract, once the Agreement is entered into and the rights and liabilities are crystallized in writing, the parties were bound to act in accordance with the written Agreement and cannot go back or rely on what they had stated prior to entering into contract.

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It is thus clear that the grievance raised by the claimant that the respondent did not provide sufficient land appears to be well-founded and must be upheld. It is also proved that the respondent is not right in contending that other contractors had done the work.”

39. Learned Arbitral Tribunal considered the effect of the letter dated 20.06.2007 addressed by the respondent no. 1 to the petitioner and held as under:-

“Even this contention has no force. Firstly, it was in relation to bidding process and not at the Development Stage Obligations

after the agreement. The Project Agreement was entered into on 14 July 2011, i.e. long after letter dated 20 June 2007. Secondly, the letter itself stated that the claimant will take up Community Initiatives "in parallel to the NTPC's land acquisition and rehabilitation activities". Thus, even in 2007, it was clear that it was the obligation of NTPC to initiate appropriate proceedings for acquisition of land as also to rehabilitate project affected persons. As already seen earlier, the respondent had failed to take appropriate proceedings for acquisition of land and for preparing and implementing R & R Policy for project affected persons. Thirdly, once the Project Agreement had been executed, rights and liabilities have to be determined on the basis of the provisions of such Agreement. As noted earlier, under Clause 8.1, it was the obligation of the respondent to provide site to the claimant. The parties to the Agreement cannot ignore express terms and conditions of such Agreement."

40. The above being finding of fact arrived at by the Arbitral Tribunal on appreciation of the evidence led before it, cannot be interfered with by this Court as a Court of appeal. In **Associate Builders** (supra) the Supreme Court has held as under:-

"33. It must clearly be understood that when a court is applying the "public policy" test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score[1]. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In P.R. Shah, Shares & Stock Brokers (P) Ltd. v. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594, this Court held:

"21. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence.

An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."

41. This Court in ***Jhang Cooperative Group Housing Society Ltd. vs. Pt. Munshi Ram & Associates Pvt. Ltd.*** 2013 SCC OnLine Del 1886 reiterated the narrow scope of judicial scrutiny under Section 34 in the following terms:

"14. With respect to the objections filed by the appellant against the final award dated 27.09.2002 we may note that the law laid down by the Hon'ble Supreme Court restricts the supervisory role of the courts while testing the validity of an Arbitration Award. In the case of McDERMOTT INTERNATIONAL INC. v. BURN STANDARD CO. LTD., (2006) 11 SCC 181, the Hon'ble Supreme Court has held as under:—

"The 1996 Act makes provision for the supervisory role of courts, for the review of the arbitral award only to ensure fairness. Intervention of the court is envisaged in few circumstances only, like, in case of fraud or bias by the arbitrators, violation of natural justice, etc. The court cannot correct errors of the arbitrators. It can only quash the award leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the court at minimum level and this can be justified as parties to the agreement make a conscious decision to exclude the court's jurisdiction by opting for

arbitration as they prefer the expediency and finality offered by it.”

It is in the parameters as laid down by the Apex Court vis-a-vis the scope of judicial intervention that the present appeal impugning the order dated 24.02.2012 has to be dealt with in respect to the final award published by the sole arbitrator dated 27.09.2002. It is seen that the Arbitrator has elaborately considered the various documents, submissions and evidence led by the parties in respect of each claim which was left to be adjudicated by the interim award. The Arbitrator has extensively gone into the evidence and evaluated the entire material before him and has published a detailed speaking award.

15. The law is no longer res Integra and is settled that where the Arbitrator has assessed the material and evidence placed before him in detail, the court while considering the objections under Section 34 of the said Act does not sit as a court of appeal and is not expected to re-appreciate the entire evidence and reassess the case of the parties. The jurisdiction under Section 34 is not appellate in nature and an award passed by an Arbitrator cannot be set aside on the ground that it was erroneous. It is not open to the court to interfere with the award merely because in the opinion of the court, another view is possible. The duty of the court in these circumstances is to see whether the view taken by the Arbitrator is a plausible view on the facts, pleadings and evidence before the Arbitrator. Even if on the assessment of material, the court while considering the objections under Section 34 is of the view that there are two views possible and the Arbitral Tribunal has taken one of the possible views which could have been taken on the material before it, the court would be reluctant to interfere. The court is not to substitute its view with the view of the Arbitrator if the view taken by the Arbitrator is reasonable and plausible.

16. If the Arbitrator has taken a view which the court finds reasonable and plausible, the court would certainly not interfere.”

42. I do not find the finding of the Arbitral Tribunal to warrant any interference of this Court in exercise of its power under Section 34 of the Act. The submissions made by the learned senior counsel for the petitioner are on the merits of the claims and Counter Claims and seek re-appreciation of the evidence led by the parties before the Arbitral Tribunal. As discussed before, the same does not fall within the scope of Section 34 of the Act.

43. Learned senior counsel for the petitioner has further submitted that the Arbitral Tribunal has erred in relying upon the correspondence exchanged and the submissions made by the petitioner before the Government of India and before the Supreme Court. He submits that such correspondence could not be relied upon as the petitioner was merely trying to protect its rights as also of respondent no. 1; however, between the petitioner and respondent no. 1, the obligations had to be considered on their own facts.

44. I am unable to appreciate the arguments made by the learned senior counsel for the petitioner. The petitioner being a Public Sector undertaking, cannot be heard to say that the contradictory correspondence with Government of India and submissions before the Supreme Court were misrepresentation of the facts and that such submissions were irrelevant. In my opinion, the Arbitral Tribunal has rightly relied upon such correspondence and submissions made by the petitioner. The same were relevant to the facts and issues before the Arbitral Tribunal.

45. Learned senior counsel for the petitioner further submits that the Arbitral Tribunal has erred in holding that the time was not of essence to

the Contract. He submits that even if time was not of essence, the obligations must be completed within reasonable time. He submits that in terms of Clause 8.3(b) of the Project Agreement, it was the defaulting party who had to make an application seeking extension of time. The said application having being made by the respondent no. 1, shows that the respondent no. 1 admitted that it was in default of performance of its obligations. He further submits that the second extension of time granted in favour of the respondent no. 1 was without prejudice to the levy of liquidated damages and therefore, not only was time of essence of the Contract but also, the respondent no. 1 was in default of performance of its obligations.

46. I am unable to agree with the submissions made by the learned senior counsel for the petitioner. The Arbitral Tribunal has rightly considered the law in relation to the time being of essence to the Contract and thereafter relied upon the fact that the Project Agreement does not contain any provision which contemplates the time to be an essence of the Contract. Clause 8.3 of the Project Agreement provides for grant of extension of time and such extension being granted on two occasions, while the third had been granted subject to the approval of the competent authority, it could not be said that under the Project Agreement time was the essence of the Contract. As far as the duty of the parties to perform their respective obligations even within reasonable time, the Arbitral Tribunal has gone in detail and considered the performance of such obligations of each party and thereafter arrived at its final conclusion. The learned senior counsel for the petitioner is therefore, wrong in

submitting that the Arbitral Tribunal has not considered this issue in the right perspective.

47. Learned senior counsel for the petitioner has further made submissions regarding the findings of the Arbitral Tribunal on the failure of the petitioner to construct approach roads and canal. He further submits that the Arbitral Tribunal has not considered the evidence pertaining to the sequence of mining.

48. In my opinion, these arguments of the petitioner require the re-appreciation of the evidence by this Court. The Arbitral Tribunal having considered these issues alongwith other obligations of the parties in detail, this Court cannot convert itself into a Court of appeal or interfere with the Award passed on such re-appreciation of evidence. The Arbitral Tribunal is the final judge of the evidence led before it and merely because the petitioner may be able to show through a maze of arguments that some findings of the Arbitral Tribunal are incorrect or suspect, the Award cannot be set aside.

49. The learned counsel for the petitioner also made submissions that the new MDO who had been appointed after the termination of the Contract with the respondent no. 1 has been successfully fulfilling its obligations under the Project Agreement. He submits that this would show that the pleas raised by the respondents were merely an eye wash in order to justify their own defaults.

50. I am unable to appreciate the said arguments on behalf of the learned senior counsel for the petitioner. The action of termination of the

Project Agreement by the petitioner has to be judged on the facts as prevailing on the date of the termination and not thereafter.

51. In view of the above I find no merit in the present petition and the same is accordingly dismissed, with no order as to cost.

NAVIN CHAWLA, J

NOVEMBER 28, 2018/rv

